**Diamond International Corporation *and* Millmen's Union, Local 1495, affiliated with United Brotherhood of Carpenters & Joiners of America, AFL-CIO.** Case 20-CA-18017

17 August 1984

## DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 18 April 1984 Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Diamond International Corporation, Red Bluff, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

"(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Substitute the attached notice for that of the administrative law judge.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Chairman Dotson does not adopt the judge's references to *Spencer Foods*, 268 NLRB 1483 (1984), in fn. 4 of his decision.

[2] In par. 1(b) of the recommended Order, the judge used the broad cease-and-desist language "in any other manner." We have considered this case in light of the standards set forth in *Hickmott Foods*, 242 NLRB 1357 (1979), and have concluded that a broad remedial order is inappropriate because it has not been shown that the Respondent has a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights. Accordingly, we have modified the recommended Order and notice so as to use the narrow injunctive language "in any like or related manner." We have also included in the notice expunction language in accordance with the recommended Order.



## APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to hire employees in retaliation for the lawful union activity of business representatives of Millmen's Union, Local 1495, affiliated with United Brotherhood of Carpenters & Joiners of America, AFL-CIO.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer immediate employment to employee Cheryl Houk at our Red Bluff facility, and WE WILL make her whole for any loss of earnings, with interest, she may have suffered as a result of being denied employment.

WE WILL expunge from our records any reference to the unlawful failure to hire Cheryl Houk.

DIAMOND INTERNATIONAL CORPORATION

## DECISION

### STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice, a hearing with respect to this matter was held before me in Red Bluff, California, on December 1 and 2, 1983.[1] The charge was filed on April 27 by Millmen's Union, Local 1495, affiliated with United Brotherhood of Carpenters & Joiners of America, AFL-CIO (the Union).

Thereafter, on July 28, the Regional Director for Region 20 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging a violation by Diamond International Corporation (Respondent) of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). Respondent's answer to

[1] All dates are in 1983 unless otherwise specified.

the complaint, timely filed, denies the commission of any unfair labor practices.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from the General Counsel and Respondent.

On the entire record, and based on my observation of the witnesses and consideration of the briefs submitted, I make the following

## FINDINGS OF FACT

### I. JURISDICTION

Respondent is a Delaware corporation with an office and place of business in Red Bluff, California, and is engaged in the manufacturing of lumber and related products. In the course and conduct of its business operations, Respondent annually sells and ships from its Red Bluff, California facility products, goods, and materials valued in excess of $50,000 directly to points outside the State of California.

It is admitted, and I find, that Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

### II. THE LABOR ORGANIZATION INVOLVED

It is admitted that the Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

### III. THE ALLEGED UNFAIR LABOR PRACTICES

#### A. *The Issues*

The principal issue raised by the pleadings is whether Respondent failed and refused to hire employee Cheryl Houk in violation of Section 8(a)(1) and (3) of the Act.

#### B. *The Facts*

Respondent and the Union herein have maintained a collective-bargaining relationship for about 20 years at Respondent's Red Bluff, California facility, and for over 30 years at Respondent's Chico, California facility, in separate bargaining units covered by separate collective-bargaining agreements. The mill at Chico was shut down for economic reasons in November 1981, and a portion of it, the boxing factory, was reopened in about February 1982. As a result, the work force at Chico decreased from about 175 to only 15 or 20 employees. The Chico employees were initially placed in layoff status, and those employees who were not rehired within a year following the layoff were terminated. Carl Holm, the Union's business representative responsible for servicing both facilities, which are located about 50 miles apart, advised all former Chico employees with whom he came in contact to apply for employment at Respondent's Red Bluff mill. Holm filed grievances during the summer of 1982 involving some 30 to 50 Chico employees who had been laid off and, apparently in November 1982, filed an additional 60 to 90 grievances as a result of the subsequent terminations of the Chico employees. Additionally two employees, Ivar Brustad and William Richmond, were hired as new employees at the Red Bluff facility subsequent to being terminated at Chico, and Holm filed a grievance on their behalf to retain the seniority they had accrued during their employment at the Chico mill.

On March 17, at the Red Bluff facility, Holm had a grievance meeting with Eugene Slocomb, Respondent's director of personnel and industrial relations, who is Respondent's principal labor relations and grievance representative for its California lumber division, including the Red Bluff and Chico facilities. Prior to the meeting, Slocomb told Holm that he was expecting a representative from the Government, and that "we'd all be out of a job" if the Government representative's review was unfavorable. As they were talking, Cleveland Martin, an agent of the United States Department of Labor, Employment Standards Administration, Office of Federal Contract Compliance Program, entered the premises. Holm introduced himself to Martin and stated that he would like to talk to him later and find out what his function was. The grievance meeting between Slocomb and Holm was then held.

Later that day Martin, who had been directed by Slocomb to Holm's office in Red Bluff, met with Holm. Holm wanted to know why Martin was investigating Respondent and what the possible results could be. Martin explained that he was conducting an equal opportunity review, preparatory to awarding Respondent a Government contract for the cutting of timber. Holm explained his concerns with the Chico employees as a result of the shutdown of the Chico facility, and Martin suggested that this was not a matter with which he was involved, but rather appeared to be a labor relations matter. At one point during the conversation, Martin mentioned that the reason Respondent did not have a sufficient number of women employed at Red Bluff was because it appeared there were not enough qualified female applicants for certain positions. This comment caused Holm to respond that a former Chico employee, Cheryl Houk, one of three female employees who had been terminated as a result of the plant shutdown, was seeking a job in Red Bluff and would be a good choice.[2] Martin said that he would mention this individual's name to Slocomb during a meeting scheduled for the next day.

When Martin left, Holm called Houk and told her to get her application updated at Red Bluff because he learned that Respondent was supposed to hire several more women. He also told her that he would call Red Bluff and attempt to schedule an employment interview for her. Apparently Holm called Slocomb that day and arranged an interview with Houk for the next day.

The next day, March 18, Martin met with Slocomb and Pauletta White, Respondent's personnel and affirmative action supervisor. He related the conversation he had with Holm the preceding day, and mentioned that there was a female employee who would like to relocate to Red Bluff. White, rather than Martin, then mentioned

[2] Holm mentioned only Houk's name as he did not then recall the names of the other female employees.

Cheryl Houk's name and said that Houk was scheduled to be interviewed. Martin testified that during this conversation he did not state or imply that Respondent had been discriminating against former Chico female employees, as Slocomb maintains, infra.

Houk, who had worked at the Chico facility since January 1977, was interviewed for a position that same day, March 18. The interview was conducted by Slocomb, an unusual occurrence as the record reflects that White performs virtually all the interviewing and hiring at Red Bluff. During the interview, according to Houk, Slocomb explained the nature of the job and, after being advised of Houk's qualifications, said that Houk would be considered for any available entry level position as a laborer. Houk's testimony is unrebutted.

On March 22, prior to another grievance meeting, Slocomb asked if he could speak with Holm privately. Slocomb, according to Holm, was very upset. Slocomb opened the conversation by stating, "I'm getting sick and tired of you and the Chico people causing all these problems." He went on to say that not only was he not going to hire "the girl [Holm] was pushing," but he was thinking of laying off the former Chico employees who were still within their probationary period. He added that Holm's complaints to Martin, the Government representative, could have "messed things up" with the compliance review. Holm attempted to explain that he did not lodge any complaints, but merely talked to Martin about the problems he was encountering.

Immediately after the grievance meeting, Holm phoned Martin and asked him what he had said that caused Slocomb to become so upset. Martin said he did not know and agreed to call Slocomb about the matter. Martin did so and explained to Slocomb, in effect, that Holm had done nothing to interfere with the compliance review.

About a week later at Respondent's Red Bluff office, Pauletta White asked Holm exactly how he learned Martin's identity. Holm replied that Slocomb had told him, and White said something to the effect that Slocomb talks too much. She asked Holm why he approached Martin with the various matters, and stated that she was an affirmative action supervisor and that Holm was getting her in trouble. She also told Holm that she had previously advised Slocomb not to hire any Chico people, and asked, apparently referring to the aforementioned grievance involving Brustad and Richmond, "Would you hire Chico people, if you knew they were going to file grievances against you?"

Slocomb admitted that during his meeting on March 18 with Houk, which Holm had arranged, Slocomb explained the job and told her that she would be considered for any future openings as a laborer. Slocomb further admitted that during his March 22 conversation with Holm he advised Holm that he was "very unhappy that he had told Cleveland Martin that Diamond was discriminating against Chico women, because it wasn't true," and further stated that perhaps in order to alleviate any problems with the compliance review, Respondent should not hire any more Chico people. However, Slocomb denied making the statement about the applicant referred by Holm, or that he told Holm that he was thinking about laying off any former Chico employees.

Slocomb further testified that, when he first met with Martin, he was advised by Martin that the Company was underutilizing both skilled and semiskilled women in the sawmill portion of the Red Bluff operations, but that the number of females employed as laborers, the entry level position, was satisfactory. He told Martin that obtaining qualified semiskilled female applicants was a problem. Later, after visiting Holm, Martin returned to the plant and said, according to Slocomb, that "Holm accused Diamond of discriminating against Chico women, but he [Martin] figured it was a labor problem, and he didn't want any part of it." Slocomb admitted that he was upset because of this, and testified that he believed Holm was making false allegations in a "deliberate attempt to sabotage the audit." However, he did not state this to Holm when Holm called to arrange the appointment with Houk. By letter dated April 15, Slocomb was notified that the preaward equal opportunity compliance review had been completed and that the results were satisfactory to Respondent.

According to Slocomb, the qualifications for the laborer or entry level position at the sawmill require only that the employees "just have to be warm and moving." Regarding his explanation for Respondent's failure to hire Houk, Slocomb testified that, either the same day or the day following his interview with Houk, White advised him that she had called Chico to "double check" Houk's employment record, and had learned that Houk was on the unacceptable list for rehire in Chico because of her attendance. As a result, White made the decision not to hire Houk.

Slocomb testified that he "could have" received a call from Martin following his March 22 chastisement of Holm, but repeatedly testified that he neither remembered any of the details of the conversation nor whether in fact he had received such a call.

White testified that in February she called Candice Murphy, the personnel secretary at the Chico facility, to inquire about Cheryl Houk, who had applied earlier and was then among four employees being considered for employment at Red Bluff for whom positions were available. She also checked on the three other applicants, Jerry Bagley, Johnny Armstrong, and Floyd Wood. During this conversation, White was allegedly told by Murphy that Houk had an "unacceptable attendance record" at Chico, but White was not provided with the details of Houk's record. Therefore, according to White, Houk was not hired at Red Bluff because of her unacceptable attendance record at Chico.

White was aware of Houk's March 18 interview with Slocomb and, when Houk appeared for her interview, White pulled her application and gave it to him. However, White claims she had forgotten about Houk's attendance record and had made no notation of it on Houk's application. Following the interview, according to White, she recalled that Houk had an unacceptable record. She again called Murphy to ensure that her recollection was correct. Murphy again checked the records and confirmed that Houk had an unacceptable

record at Chico. White then so advised Slocomb and, as a direct result, Houk was not hired. The three other applicants whom White was considering at the time, Armstrong, Wood, and Bagley, were hired at Red Bluff, as they had acceptable records while employed at Chico.

White specifically and repeatedly testified that the sole reason Cheryl Houk was not hired at Red Bluff was because of her attendance record at Chico, and that neither Houk's work performance, work quality, nor experience was a factor. According to White, Houk was simply no longer considered for employment when it was learned that her attendance record at Chico placed her in the category of being unacceptable for rehire at that facility. Significantly, however, White did not submit this as a reason for failing to hire Houk during the investigation of the instant charge by the Board. Rather, her sworn affidavit states, "Applicants with prior relevant experience are given final consideration when we are filling jobs . . . the date of job application is considered—when considering applicants who are otherwise equal in qualifications. I have considered Cheryl Houk each time a laborer has been hired, Employees hired since March 1983 have either been more experienced or have. had applications on file longer than Cheryl Houk."

Upon considering the matter, White believed her affidavit to be deficient in that it did not reflect the underlying reason, attendance, for the failure to employ Houk. Therefore, specifically to clarify Respondent's position, she prepared an explanatory letter to the Board agent. The letter, written by White although signed by Slocomb, does not mention that Houk's attendance precluded her from being employed, and contains attachments listing the names of 29 individuals and a brief explanation of why each was hired under the heading "Reason for Hire Ahead of Cheryl Houk." Twenty-six of the individuals were hired as laborers, the position for which Houk was admittedly qualified. The list reflects that these employees were hired ahead of Houk because of prior related experience, or because they had "acceptable work records." In only two instances does the list specify as a reason for rejecting Houk over the particular applicant who was hired that "Cheryl Houk's work record with Diamond was again a factor," and in only one instance does the list state that "Cheryl Houk did not have an acceptable work record with Diamond." In no instance did Respondent state that, as White explicitly and repeatedly testified at the hearing, Houk was rejected because of her attendance. White testified that she was unable to explain why she did not use the word "attendance" in her affidavit or the attachment to the aforementioned letter and said, "I could have swore that I did. That's the way it was in my mind, yes." When asked why she did not just directly say that Houk was not hired because of poor attendance, White again replied that Houk's attendance record was the only reason, but that the reasons she proffered during the investigation were synonymous with poor attendance in her mind.

Regarding the compliance review, White testified that she was present when Martin mentioned Houk's name to Slocomb.[3] Thereafter, she pulled Houk's file and gave it to Slocomb. There was nothing in the file or on the application denoting that Houk's employment was deficient. White also testified that she was "very concerned" that Holm had made an allegation that the Company had been discriminating against employees, and stated that she was present when Martin told this to Slocomb. She did tell Holm that, according to her affidavit, "If we had hired from the outside, without giving preference to Chico people, we wouldn't have had the problems with the audit." White admitted, however, that in fact no preference was given to Chico employees, and they were allegedly treated in the same manner as applicants who had not previously worked for the Company.

Billy Leon Lafferty is personnel manager at the Chico facility. He testified that the entire Chico work crew was laid off in November 1981, and those employees who had not been recalled were terminated in November 1982. In December 1982, the policy was established that any former employee with over six occurrences of absence or tardiness during a 12-month "work period" would be deemed unacceptable for rehire at that time, and an "occurrence sheet" was devised to be attached to each application for easy reference. Each employee's work record was reviewed, and the applications for rehire were separated into an acceptable and substandard file. Cheryl Houk was placed in the substandard file. Her occurrence sheet shows nine occurrences of absence or tardiness, totaling 27.2 hours, during the 12-month working period prior to her discharge, and that she received no warning letters. The occurrence sheet is incorrect, however, infra. Under the established guidelines, an absence was considered an "occurrence" regardless of whether the employee was ill or had an excused absence. Moreover, each tardiness, regardless of its duration, and each absence whether for part of a day or a full day, with certain exceptions not relevant here, was deemed to constitute one occurrence. Thus, an employee with nine occurrences could have missed as much as 72 hours of work or as little as an hour or so.

Lafferty testified that the data on the occurrence sheets were hastily compiled in anticipation of a great influx of applications. Indeed, there were approximately 165 applications for less than 20 jobs. Lafferty further stated that, based on the standard for reemployment then utilized, approximately half of the former Chico employees were deemed to be unacceptable for rehire at that time. White testified that she was aware of this standard which Lafferty applied to the former Chico employees.

Lafferty testified that Houk was rehired at Chico in July 1983, as the applicants in the acceptable file had been exhausted and the applications of the remaining employees were reevaluated. As a result, Houk was among the first employees to be rehired. Lafferty further testified that, in his estimation, an employee's "work record" is defined as including the nature of the jobs the employee is capable of performing, and his or her overall conduct and attendance. Thus, attendance, according to Laf-

[3] As previously noted, Martin testified that he told Slocomb and White that he was aware of a female applicant for a job with Respondent, whereupon White stated Houk's name.

ferty, constitutes merely one of several factors comprising an employee's work record. White testified that she was not aware of Houk's work record as the term was defined by Lafferty, but was merely aware that Houk's attendance was deficient.

Respondent's attendance records for Houk show that during her 12-month work period preceding her discharge she was absent for a total of 23.2 hours and had 8 occurrences, rather than 27.2 hours of absence and 9 occurrences as erroneously reflected on her occurrence sheet. Thus, during the applicable period, she missed 2 full days of work totaling 16 hours, and had 6 other occurrences totaling 7.2 hours, each occurrence ranging from 12 minutes to 3 hours and 24 minutes. The record contains similar figures for the three other former Chico employees who were under consideration and who were hired: Jerry Bagley had 4 occurrences and was absent for 19 hours; Johnny Armstrong had 4 occurrences totaling 25 hours, nearly 2 hours of absence more than Houk; and while the record regarding Floyd Wood is not clearly legible, it appears that he had 5 occurrences totaling 18 hours.

### C. *Analysis and Conclusions*

Respondent argues repeatedly in its brief that the "essential" and "crucial" point is that once White ascertained that Houk's attendance record at Chico caused her to be placed in the "unacceptable for rehire at that time" file at Chico, Houk was thereafter not considered for hire at Red Bluff and her application was not compared with others each time an opening occurred. Indeed, White admitted she had no idea of Houk's work record and, according to Respondent's brief, the fact that Houk may have been able to do the job has no relevance. Nor, according to Respondent, does it matter that White hired numerous other applicants who were not former Chico employees, without ever checking their attendance or employment records with prior employers. The fact that Respondent clearly applied a more stringent standard to former Chico employees makes no difference, according to Respondent, so long as it treated all the Chico applicants equally.[4]

While the foregoing summary of Respondent's argument, if supported by the evidence, may provide a lawful rationale for Respondent's failure to hire Houk, the threshold question remains: Why did Respondent not make these contentions during the investigative stage of this proceeding? White, who appeared to be a knowledgeable individual and holds a highly responsible position with Respondent, was given every opportunity to do so, and in this regard her reasons for failing to hire Houk, contained in her affidavit, must be restated: "Applicants with prior relevant experience are given final consideration when we are filling jobs . . . the date of job applicant is considered—when considering applicants who are otherwise equal in qualifications. I have considered Cheryl Houk each time a laborer has been hired. Employees hired since March 1983 have either been more experienced or have had applications on file longer than Cheryl Houk." The foregoing explanation is simply false. Thus, White testified that once she learned that Houk was unacceptable for rehire at Chico, she thereafter eliminated her from consideration; and White admittedly was never aware of Houk's work experience. Most importantly, White failed to mention during the investigation that Houk's "attendance" was even a consideration when, in fact, it was allegedly the sole, determinative, and operative reason for Respondent's refusal to hire her.

As noted previously, White, believing that her affidavit did not fully explain why Houk was not hired, supplemented it with a letter containing a summary of her rationale for hiring some 29 other individuals, under the heading "Reason for Hire Ahead of Cheryl Houk." Clearly it was not a small undertaking to compile such a list, and if the true reason for failing to hire Houk was her alleged unacceptable attendance at Chico, White's failure to simply and directly submit this as a reason was entirely irrational. Moreover, rather than disclose the alleged operative reason, White engaged in the futile exercise of compiling the aforementioned list containing, as Respondent must now concede, unnecessary and superfluous information. Further, the list itself is tantamount to an admission that Houk's placement in the "unacceptable for rehire at that time" category at Chico because of her attendance was not the reason for her failure to be hired at Red Bluff. Thus, the list expands upon the reasons given in White's affidavit regarding the "experience" of other applicants, and only in three instances was Houk's "work record" considered to be "a factor" in Respondent's determination not to hire Houk. Assuming arguendo that despite White's position as an equal opportunity and personnel supervisor she was nevertheless not conversant with the distinction between "work record" and "attendance," White gave no plausible explanation for stating in the attachments to the position letter that Houk's work record (meaning, according to White, "attendance") was only "a factor" rather than the one and only reason for Houk being automatically disqualified from consideration for employment at any time thereafter, as White adamantly maintained at the hearing.

I discredit White, and am constrained to conclude that her testimony and the documentary evidence she provided are total fabrications. Simply stated, White's explanations for her conduct are inconsistent and nonsensical, and Respondent has proffered no plausible explanation to justify White's varying and incongruous reasons for her rejection of Houk. Moreover, I discredit the testimony of Candice Murphy, personnel secretary at Chico, to the extent that it corroborated White's testimony.

The record is clear that both Slocomb and White were extremely upset with Holm and initially believed, incorrectly, that Holm was attempting to "sabotage" the equal employment opportunity compliance review or audit conducted by Martin. Holm had no such intention, as Slocomb was specifically made aware by Martin during their subsequent phone conversation. Yet, apparently neither Slocomb nor White appreciated Holm's discussing the various labor relations problems with Martin, and de-

[4] In another context, similar treatment of former employees was found to be discriminatory and violative of the Act. *Spencer Foods*, 268 NLRB 1483 (1984).

cided to retaliate, I conclude, by failing to hire Houk. Indeed, Slocomb had earlier threatened to so retaliate against Holm by directly telling him, I find, that he was not going to hire "the girl [Holm] was pushing."[5]

Having found that Respondent's shifting reasons for its failure to hire Houk are patently false, it may be inferred that there is another concealed motive for such conduct. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 446, 470 (9th Cir. 1966); *Daniel Construction Co.*, 229 NLRB 93, 95 (1977); *Kern's Bakeries*, 227 NLRB 1329, 1332 (1977); *John P. Bell & Sons, Inc.*, 266 NLRB 607 (1983). However, it appears unnecessary to make such an inference because, as noted, it was directly and succinctly stated to Holm by Slocomb that as a result of Business Representative Holm's conduct in meeting with a representative of the Department of Labor to discuss matters concerning current and former Chico employees, Slocomb determined that he would not hire the applicant referred by Holm. In meeting with Martin to dicuss union-related matters, and in referring Houk, a former unit member, for employment, it is clear that Holm was engaging in legitimate union objectives as business representative. Retaliation against an employee because of the legitimate union activity of another is clearly violative of the Act. See *Kern's Bakeries*, supra; *H. B. Zackry Co.*, 261 NLRB 681, 682 (1982); *Albertson Mfg. Co.*, 236 NLRB 663 (1978); *Copes-Vulcan, Inc.*, 237 NLRB 1253 (1978). Moreover, it would appear to make no difference whether the union activity was engaged in by a coworker or union representative, as the adverse effects on the employee remain the same. I therefore find that, as alleged, Respondent's failure to hire Houk is violative of the Act.

Respondent, in its brief, argues that even if it were motivated in part by antiunion considerations in its failure to hire Houk, it would nevertheless have refused to hire her because of her attendance record.[6] In making this contention, Respondent would apparently reiterate its prior arguments, maintaining that only seven former Chico employees were hired at Red Bluff, and none of them had over six occurrences of tardiness or absenteeism. Under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), Respondent assumes the burden of overcoming the General Counsel's prima facie case and, as applied to the instant matter, must demonstrate that Houk would not have been hired in any event because of her attendance, as she was admittedly otherwise qualified for the position. The fact that seven applicants from Chico were hired, and that each of them had fewer occurrences than Houk, does not demonstrate that those employees with more than six occurrences were not even considered for hire. As noted previously, I have specifically discredited White and her testimonial assertions that employees deemed unacceptable by Chico because of their attendance were thereby eliminated from consideration at Red Bluff. Moreover, Respondent has produced no probative documentary evidence establishing this contention. Thus, I conclude that Respondent has not met its burden of proof under *Wright Line*.

[5] I credit Holm and Martin to the extent their testimony is inconsistent with that of Slocomb and White.

[6] Respondent does not maintain that Houk would not have been hired as a result of her experience or work record, because the record herein shows that Houk's qualifications and experience surpassed those of a number of employees subsequently hired.

## CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(1) and (3) of the Act by failing and refusing to hire Cheryl Houk in March 1983.

4. The aforesaid unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

## THE REMEDY

Having found that Respondent violated and is violating Section 8(a)(1) and (3) of the Act, I recommend that it be required to cease and desist therefrom and from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act, and to take certain affirmative action described herein, including the posting of an appropriate notice attached hereto as an appendix.

Having found that Respondent unlawfully failed and refused to hire employee Cheryl Houk, it is recommended that Respondent offer her immediate employment to the position for which she is qualified and make her whole, with interest, for any loss of pay she may have suffered as a result of the discrimination against her. Backpay is to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

IT IS FURTHER RECOMMENDED that Respondent expunge from its records any reference to the foregoing unlawful failure to hire Houk and advise her that it has done so. See *Sterling Sugars*, 261 NLRB 472 (1982).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

## ORDER

The Respondent, Diamond International Corporation, Red Bluff, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to hire employees in retaliation for the lawful union activity of union representatives.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Offer employment to employee Cheryl Houk at Respondent's Red Bluff facility, and make her whole in the manner set forth in the section of this decision entitled "The Remedy." In this connection, the Respondent shall preserve and, on request, make available to the Board or its agents for examination and copying, all records, including the payroll records of other employees, necessary to analyze and compute the amount of backpay due.

(b) Expunge from its records any reference to the unlawful failure to hire the said employee.

(c) Post at its Red Bluff and Chico, California facilities[8] copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by it immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[8] As the unfair labor practices found herein affect the rights of employees at both the Red Bluff and Chico facilities of Respondent, it appears that posting of notices at both facilities is necessary to remedy the violation and advise employees of their right to be considered for employment and hired at either facility in a nondiscriminatory manner.

[9] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."